

ARBITRATION ADVISORY

94-02

JURISDICTION TO ARBITRATE COURT ORDERED FEES

April 22, 1994

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It has come to the attention of the Committee on Mandatory Fee Arbitration that an issue has developed regarding the jurisdiction of this program to arbitrate a fee dispute when the fee has been purportedly set by "statute or court order." Apparently, the scope of this limitation is the subject of some inconsistent application throughout the state. That inconsistency, coupled with several recent inquiries to the Committee regarding the proper definition of a fee set by "court order," has prompted the Committee to issue this Advisory.

Section 6200(b) of the Business & Professions Code states that:

This article shall not apply to any of the following:

- 1) Disputes where . . .
- 2) Claims for . . .
- 3) Disputes where the fee or cost to be paid by the client or on his or her behalf has been determined pursuant to statute or court order.

There is little legislative history to assist arbitrators in understanding the scope of the legislature's actual intent in adopting this jurisdictional limitation.¹ However, a review of Section 6200 in toto and accepted rules of statutory construction^{1/} suggest the following.

In adopting Section 6200(b)(3), it appears that the legislature attempted to ensure against (and thus avoid) both collateral attacks on and potential conflicts

¹ ^{1/}(1) Ascertain the intent of the Legislature so as to effectuate the purpose of the law. (2) Give a provision a reasonable and common sense interpretation consistent with the apparent purpose, which will result in wise policy rather than mischief or absurdity. (3) Give significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole. (4) Take into account matters such as context, object in view, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction. (5) Give great weight to consistent administrative construction." 7 Witkin, Summary of California Law, Constitutional Law, §94, pp. 146-147.

between a final, enforceable order regarding attorneys fees, issued by a state or federal court and a subsequent fee arbitration award.

Both the California Codes and the United States Codes contain frequent references to such court-ordered, court-approved fees. For example, fees for counsel employed in probate proceedings, bankruptcy proceedings and worker's compensation proceedings. In each of these situations, the court of original jurisdiction retains the sole authority to determine the propriety of legal fees arising out of the underlying legal action. Under these circumstances, it is clear that the California legislature was careful not to usurp that authority through the enactment of the fee arbitration statutes.

However, there are other situations where contribution for attorneys fees (and costs) is ordered as part of a civil proceeding, but where such fees are not set by statute.

For example, California Family Code § 2030 provides that the court may order one spouse to contribute to the attorneys fees and costs incurred by the other spouse during a marital dissolution proceeding, based upon the ability of each spouse to pay and/or the economic needs of each spouse and the ability of each spouse to secure competent representation. Such an order for contribution does not purport to adjudicate the propriety of the fee charged a spouse by his or her own counsel; such questions remain within the elective purview of the fee arbitration process.

There is also the situation where a client, pursuant to a contract, has the right to request that a court order the opposing party in a civil action to pay all or a portion of the client's costs, including attorneys' fees incurred in the lawsuit [See, e.g., Civil Code. § 1717]. In this case, the court's focus is the amount of fees, if any, it will require the losing party to pay to the prevailing party.

These factual scenarios (i.e., fees awarded a prevailing party) appear to create the most confusion when fee arbitration jurisdiction is at issue. Where fees are awarded the prevailing party, has the reasonableness of the fee, as between attorney and his/her client, been adjudicated and set by "court order?" The Committee on Mandatory Fee Arbitration does not believe so.

Section 6200(a) of the Business and Professions Code provides that the State Bar of California, through its board of governors create and maintain "a system and procedure for the *arbitration of disputes* concerning fees, costs, or both, charged for professional services" (emphasis added). By common definition a "dispute" denotes a disagreement or controversy; "arbitration" is the settlement by decision by an impartial person of a dispute after the explication of opposing views. When a client is dissatisfied with the fees charged by the client's attorney, there exists a dispute between attorney and client in which each holds opposing views. By statute this dispute may be resolved by fee arbitration.

Under the foregoing examples, the court, by necessity, is not compelled to adjudicate the reasonableness of the fees charged the prevailing party by his or her own counsel. In fact, a review of several federal civil rights decisions, including Blanchard v. Bergeron, (1989) 489 U.S. 87 and Venegas v. Mitchell, (1990), 495 U.S. 82 reveals that the Court specifically declined making such a ruling in both instances.

In both of the above-referenced cases, counsel for the prevailing party had a contingency fee agreement with his/her own client. Not only was that fact disclosed to the court as part of the motion to tax fees, but the Supreme Court specifically stated, on both occasions, that the specific fee agreement between attorney and client was but one criteria reviewed by the Court in reaching its decisions regarding the proper amount of fees to be awarded the prevailing party. Moreover, both Courts awarded fees based on the federal "lode-star" hourly (not contingency) fee formula, while one Court specifically stated it was not adjudicating the reasonableness of the fee agreement between attorney and client, as the attorney was not properly before the court as a party participant.

This Committee endorses that reasoning. Under the foregoing scenarios, clients and their counsel do not view themselves as adversaries when seeking the recovery of fees and costs from an opponent. To the contrary, attorney and client are working toward the same goal. The court is not called upon to decide a dispute between attorney and client. Thus, there can be no "dispute" between client and attorney which has been "determined pursuant to...court order" as a result of the court's decision on the issues before it [B & PC § 6200(b)(3)].

The determination of a request for fees as a component of a judgment in favor of one party in a civil action does not provide either the client or the attorney with a "fair, impartial, and speedy hearing and award" [B & PC § 6200(d)] as it pertains to a dispute between attorney and client regarding attorney's charges to the client for professional services. Similarly, such a determination by a court does not decide the issue of the "*fee or cost to be paid by the client*" (emphasis added) [B & PC § 6200(b)(3)] as the result of such determination is the amount of fees to be reimbursed to the client by another party.

The rules of statutory construction compel the conclusion that only those court ordered fees which fix the totality of the fee *to be paid by the client* after full opportunity for the court to consider the opposing views of the attorney and the client in the context of resolving a dispute pertaining to fees and/or costs, are the court ordered fees to which the exclusion of jurisdiction under Section 6200(b)(3) of the Business and Professions Code has application.

For the foregoing reasons, the Committee believes that the circumstances giving rise to the recovery of attorney fees and costs from an opponent in litigation do not deny a client the right to arbitrate a fee dispute with his or her own attorney. Such fees are not set by "court order." The reasonableness of a fee, as between attorney and client, is not adjudicated in those proceedings; the very nature of the dispute is between adversaries. As such, it is the Committee's position that fee arbitration jurisdiction should not be denied under these circumstances.